No. ~~8587~~ 8588.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,

Appellants,

vs.

JAMES B. HAGGIN ET AL.,

Respondents.

BRIEF AND ARGUMENT

Of STEWART & HERRIN,

Attorneys for Merced Canal and Irrigation Co. and Others.

Filed April 16 *A. D. 1885.*

J. D. McCarthy *Clerk.*

By Frank Myers *Deputy Clerk*

SAN FRANCISCO:

GEO. SPAULDING & CO., GENERAL BOOK AND JOB PRINTERS,

414 CLAY STREET.

In the Supreme Court

OF THE

STATE OF CALIFORNIA.

CHARLES LUX ET AL.,
Plaintiffs and Respondents,
vs.
JAMES B. HAGGIN ET AL.,
Defendants and Appellants.

This is a controversy in regard to the right to the use of a portion of the water of Kern River, in Kern County, diverted by the Calloway Canal Co. (which is the real defendant), for the purpose of irrigation. Defendant is the prior appropriator, and contends that prior appropriation is the test of priority of right in that county by the common law of California, and also by the statutes.

The plaintiffs are the owners of certain lands situated in Kern County, below the point where the defendant diverts the water, and on what plaintiffs claim to be the same stream from

which the diversion is made. Plaintiffs claim the right to have all the water of the stream flow over their land, without regard to whether or not they have any use for such water, and also without regard to any benefit it may be to them. They make this claim under what they contend are the rules of the common law.

The Court finds that the lands on Kern River cannot be cultivated or inhabited without irrigation. (Finding 61.) The Court also finds, "That the use to which the water di-"verted by the defendant was applied, was to "supply a natural want, and the quantity taken "was necessary and reasonable." (Finding 73.) And the Court further finds, "That on the lands "irrigated by the Calloway Canal, irrigation is a "natural want, and that defendant took no more "of the waters of Kern River than was necessary "and reasonable." (Finding 74.)

The title to the land in Kern Valley, including the land of plaintiffs and the land irrigated by defendants' canal, was derived from the United States.

Argument.

This argument will be based upon the hypothesis that the common law, the Constitution, and the laws of this State and of the United States, are the only laws which are in force in this State.

It is necessary to determine, *First*, what are the rights of the parties under the common law; and, *Second*, how those rights have been affected or modified by the statutes.

The Common Law.

The common law is a system of principles, applicable to the changing conditions of man. Every decision not founded upon express statute is according to the common law, if it is according to reason and justice; otherwise, it is not law. The common law requires the administration of justice—justice according to English and American precedents, if there are any; according to the precedents of other countries, if there are none in England or America; and, if no precedents exist anywhere, according to cultivated reason.

Independent of statutes, the right to the use of water must be determined in accordance with the common law.

In applying the principles of the common law to the regulation of the use of water, it has been found that the circumstances under which water is used are so different, that no uniform rule is applicable to all cases. The Courts have, therefore, declared that the principles of the common law require a reasonable use of flowing water,

and what is reasonable must depend upon the circumstances of each case, such as the size of the stream, its volume, its fall, the state of manufactories, the density of the population, the climate, and the usages and customs of the locality.

In early times in England, before the establishment of manufactories, and while the country was sparsely settled, no one was allowed to intercept the flow, diminish the quantity, or pollute the quality of a running stream. As civilization advanced, new uses for flowing water became necessary. Population increased, cities grew up, and manufactories were established, either polluting the water or interfering with the power of its fall to propel machinery.

The principles of the common law allowed so much pollution of water as was reasonable and necessary, and so much damming of the stream to obtain fall as could be done without material injury to others. Imperative necessity requires a new application of the common law to meet each change of circumstances. These changes of circumstances have been so numerous that we already have many volumes of books devoted to a record of the application of the common law to new conditions. These different applications of the common law are not only contained in books of reports, but many learned commentators have

written exhaustive text-books, pointing out how flowing water may be used under different circumstances.

Through all the history of the development of rules for the regulation of flowing water, the controlling principle of the common law has been to promote the public good, and to conform to the necessities of man; for example, in some of the States manufactories became the principal industry, and it was found necessary to utilize and economize water power for that purpose, and to that end it was necessary on many streams to back the water so as to destroy the water power of the land-owners above. By previous decisions this could not be done.

In Massachusetts and some other States there is an important limitation to the rule that no superior right to the stream is acquired by mere occupancy, and the owner of land who first erects a dam for the purpose of operating a mill upon his own land, has the right to maintain it as against proprietors above and below, although it may set the water back to such a distance and height as to prevent a proprietor above from having a sufficient fall to carry a mill upon his own land, or preclude any subsequent erection below him. "To the extent," says Bigelow, C. J., "to which the descent or fall of water in a stream is taken up and occupied by the erection of dams for the purpose of carrying mills, the right of other owners on the same stream, who have not improved their sites for the creation of waterpower and the driving of mills, is abridged and taken away. In such case prior occupancy gives priority of title. Although the right to the use of water is inherent in or appurtenant to land, it is nevertheless in a certain sense a right *publici juris*, and subject to the rule of law, which regards the erection of a dam for the purpose of

creating mill power a profitable, beneficial and reasonable use of the stream, of which riparian proprietors on the same stream, who have not appropriated the force and fall of the water on their own land, cannot complain. It is *damnum absque injuria.*" (Gould on Waters, sec. 227.)

Classification of Uses.

For the purpose of discrimination the uses which may be made of flowing water are divided into natural and artificial. Natural uses are such as are necessary to man's existence in the locality where the water is used. These are called ordinary uses. Artificial uses of water are such as are beneficial, but not essential to man's existence, and these are called extraordinary uses. What would be an artificial and extraordinary use of water under some circumstances, might become a natural and an ordinary use under other and different circumstances; for example, in arid countries where man cannot exist without water for irrigation, the use of water for that purpose is most natural and ordinary, while in a wet and humid country where irrigation is not required, the use of water for that purpose would be most unnatural and extraordinary. This distinction in the use of water is well stated by Mr. Angell in his work on Watercourses, sec. 121, as follows:

It is very easy to be perceived that judicial tribunals in this country, in a number of instances, in expounding the law of watercourses, and in adjusting the con-

flicting claims of riparian owners, have had in their minds a distinction between one kind of use of water and another; one of which may be called a use for *natural* purposes, and the other for *artificial* purposes. A distinction of this sort was, for the first time it is believed, expressly laid down in a case before the Supreme Court of Illinois * * * * * * * The wants of riparian proprietors on a watercourse, in the opinion of the Supreme Court of Illinois, as expressly declared, may be thus summarily stated: They are either *natural or artificial*; *natural* are such as are absolutely necessary to be supplied, such as *thirst* of people and of cattle, and *household purposes*; and, in *arid* climates, water for *irrigation* is referred to the class of *natural* wants, to which *artificial* wants must ever be legally subservient. So that, whether the want of water for the purpose of irrigation, be a *natural* or an *artificial* want is dependent upon circumstances. (Angell on Watercourses, 6 Ed., sec. 121.)

The same distinction was made by Chief Justice Murray, in discussing a question as to the use of water in *Crandall* vs. *Woods*, a case which arose in Nevada County, in 1857. He said:

The uses to which water may be appropriated are: 1st, To supply natural wants, such as to quench thirst, to water cattle, for household and culinary purposes, and, in some countries, for the purposes of irrigation. These must be first supplied, before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories, and the like, which are not indispensable to man's existence. (*Crandall* vs. *Woods*, 8 Cal., 142.)

The question whether the use of water in any particular locality is necessary to man's existence, is a question of fact, and not of law. But when the facts are ascertained, and it has been determined as a matter of fact that a certain use must

be made of flowing water to render a country fit for habitation, it becomes a question of law how such water shall be used. The common law authorized the person nearest the source of the stream to take all the water necessary to supply his natural wants. In a country where irrigation is a natural want, by parity of reasoning, all the water may be taken for that purpose.

The fact that the use of water for irrigation is not a natural want nor an ordinary use in England, does not prove that such is not the case in Kern County. In England, water for irrigation is not required, while in Kern County the existence of man depends upon its use for that purpose. The necessity for this different use of water in the two countries arises from a different state of facts, produced by different climatic conditions. The common law regards the necessities of man and conforms its rules to the laws of nature.

If it were as necessary in England to use water for irrigation as it is to quench thirst, the common law would authorize its use for that purpose, and would make the use of water for irrigation a preferred use.

Much of the confusion and uncertainty existing in this State on the water question arises from a failure to distinguish what is law and what is fact

in the application of the common law. Counsel have cited cases which arose in England and the Atlantic States, not for the purpose of showing that in those countries water is used according to the wants and necessities of each locality, but for the purpose of showing that flowing water cannot be used in California for any other purposes than such as are required in those countries. They treat the common law as an arbitrary code, and apply a decision made in England on one state of facts, to a case in California where the facts are entirely different. The most striking example in the books of confounding law and fact is found in the celebrated case of *Vansickles* vs. *Haines*, 7 Nev., 249. Vansickles had appropriated a small stream of water in Carson Valley, Nevada, for irrigation; subsequently, Haines purchased from the United States land on the stream below. The Supreme Court of Nevada held that Haines was entitled to have all the water flow over his land, and that Vansickles had acquired no rights by his prior appropriation. The Court, in its opinion, said:

> Whatever the common law rule may be, whether applicable or not, it is made the law of this State, and is as binding upon us as any statute ever adopted by the Legislature; and therefore, we have no more power to annul or repudiate it, than we have to disregard a legislative act. (7 Nev., 285.)

Great injustice was done in that case as between

the parties thereto, but the wrong done them was trifling compared to the injury inflicted by the decision as a precedent.

The eminent ability and high character of the Judges who composed the Supreme Court of Nevada, and who participated in the rendition of that decision, gave it commanding influence as an authority. It has been taken in many places on trust, without the slightest investigation of the reasons upon which it is founded. We would like to inquire of gentlemen who endorse the doctrine of that decision, if Courts have no more power to annul or repudiate former decisions, even where the facts are the same, than they have to disregard legislative enactments, how does it happen that several thousand adjudged cases in England and America have been overruled, while no single legislative enactment passed by Constitutional authority has been annulled or disregarded by the Courts?

The Supreme Court of Nevada, in that case, had no occasion to overrule precedents. No case had then been decided in England or America where the fact that irrigation was necessary had been presented or considered.

The Court, in its decision, was guided by the facts found in reported cases, and wholly disregarded the facts of the case it was considering.

The Court below found that Vansickle had appropriated the water for his *necessary* purposes. The Supreme Court disregarded that fact, and seemed to think that it made no difference for what purpose Vansickle diverted the water—whether to supply a natural or an artificial want.

It is gratifying to know, however, that in *Broder* vs. *The Water Co.*, 101 U. S., 274, the doctrine of *Vansickles* vs. *Haines* was overruled. The Supreme Court of the United States held in that case that a person diverting the water of a stream upon public land acquired the right to the use of such water as against a subsequent purchaser from the United States. This was exactly the reverse of what was decided in *Vansickles* vs. *Haines* by the Supreme Court of Nevada.

The Supreme Court of this State in *Osgood* vs. *Water and Mining Co.*, 56 Cal., 571, concurred in the doctrine announced by the Supreme Court of the United States in *Broder* vs. *The Water Co.*, and it is to be hoped that the power of the Nevada case for evil will soon be exhausted.

Judge Cooley, in a very interesting article in the *North American Review*, in December last, gives a glowing description of the growth of the unwritten law which he calls "Popular Legislation." Among other things, he said:

> A vague impression prevails that the species of popular legislation to which we owe the common law has

come to an end, and that customary law is to be looked upon as a finished code, to be altered and improved by statute only. As a theory for legal purposes, this may pass unchallenged; but it is very far from expressing the fact. Probably popular legislation was never so active as now. The reasons for this are all about us—in the wonderful activity of invention and production; in the marvelous expansion of business; in the infinite variety of new conditions to which the law must be conformed. Sometimes statutes have sufficiently provided for the new ways, new things, and new conditions, sometimes imperfectly, and sometimes not at all, and the legislation of usage must supply the defects. How effective it is, we only know when the occasions arise for adjudication upon it. * * *

Some kinds of business are so entirely new in some of their features that precedents are nearly worthless. The business of operating a railroad is one of these. Statutes do very much to determine what the respective rights and obligations of the public and the proprietors shall be, but constantly some combination of peculiar facts is raising new and peculiar questions upon which the statutes throw little light, and the courts are compelled to determine them upon the reason of the common law. * * *

It may be thought that the judge, in thus taking note of the formation of customs among the people, is in danger of deferring to public opinion to an extent that may make him the mere mouth-piece of temporary passion, or prejudice, or possibly of party views. Undoubtedly, there is some danger of this, but it is a danger that is encountered necessarily. The judge who turns a deaf ear to popular clamor at all times, and means to heed only the voice of the law, is still compelled to bear in mind, when dealing with common-law questions, that the common-law in its very nature is subject to continuous change, and that he is always concerned with it as it is at the time, and can consider what it has been only as an aid in determining its present state.

Mr. Wharton, whose "Commentaries on American Law" must be conceded to be the most accurate and philosophical work on that subject,

speaks in the highest praise of judge-made law. He says:

As has been well said, judge-made law is superior to statutory law in the skill and persistent caution and circumspection with which it is prepared. * * * *

The peculiarity of juridical evolution, however, is this, that while animal evolution works itself out without human agency, juridical evolution is worked by the agency in part of jurists and text-writers, in part of legislatures, in part of courts. It is by the courts, however, as we have seen, that the work is mainly effected; and, perhaps, the chief difficulty in the way of the work being thoroughly done, is that those doing it are not always aware of the important mission in which they are the necessary co-workers. Too often we still hear, even from Judges of the highest courts, that Judges cannot be legislators; and too often this is the reason given for the pushing, even to consequences to which it does not legitimately extend, some rule which should be thrown overboard as obsolete. Judges are not legislators for the purpose of revolutionizing the law, but they are legislators for the purpose of evolving from it rules which should properly govern present issues, and winnowing from it limitations which are withered and dead. And when this duty—a duty which is a necessary incident of judicial office—is frankly recognized by the judiciary, the process of legal development and of supersession will be carried on much more effectively and wisely than it can be done by those who shut their eyes to the duty. For no disclaimer can relieve the judiciary from the function of gradually modifying the law, both by adaptation and rejection. So absolute is the necessity, that the very statutes which are passed to correct the action of the courts, require the action of the courts, not only for their execution, but for their construction. Sec. 30 * * * * * * * *

Precedents are of immense value as guides for future action. But they are prophesies more or less precise as to future law, and not absolute arbiters of what that law shall be. This last office they cannot assume, (1) because law, like all other sciences, is the subject of evolution; (2) because, as the circumstances of a people change, its laws must

change; and (3), because there is no precedent that exactly fits any subsequent case. (Wharton's Commentaries on American Law, Sec. 31).

The italics are ours.

The cultivation of the soil by means of irrigation is a new industry in the United States, and is not extensively practiced except in that portion of our territory which we acquired from Mexico.

The people of the irrigating section of this State understand that the right to the use of flowing water for purposes of irrigation must depend upon appropriation, and that priority of appropriation must be the test of priority of right, and upon the faith of such understanding, have invested millions in ditches, canals, farms, vineyards, orchards, homes, cities and villages, and have made Southern California the most attractive country in the United States. They are now awaiting an authoritative declaration by this Court of the law under which they have lived, and to which they have conformed for more than thirty years.

Precedents.

Where can this Court find precedents for the case at bar? It is idle to examine English reports to find authorities for the distribution of water for irrigation, because in England irrigation

is not a necessity. But it by no means follows that we have no precedents applicable to the use of flowing water in Kern County. Cases are referred to only as guides to show what is reasonable and just under a given state of facts. We assume that what reasonable men have done and continue to do under given circumstances, is some evidence of what is reasonable and just, under like circumstances. It makes no difference whether the usages and customs of a people are evidenced by unwritten laws or written constitutions and codes, the question remains the same: What have sensible people been in the habit of doing under circumstances similar to those of the case in hand? For this purpose the usages and customs of all countries may be examined.

The genius of the common law draws to itself the wisdom and experience of all nations. The municipal law of England and America was formed more by absorption than creation. By judicial decisions the law-merchant of Continental Europe was made part of the common law. No legislation was required to incorporate into the equity jurisprudence of England and America the principles of the civil law of Rome. In the absence of English precedents applicable to the peculiar conditions of California, why may not the courts of this State draw from the wisdom and expe-

rience of countries where irrigation has been practiced?

In the language of Judge Matthews of the Supreme Court of the United States, in the Hurtado case:

> It was the characteristic principle of the common-law to draw its inspiration from every fountain of justice, and we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms. (*Hurtado* vs. *California*, 110 U. S., 531.)

Judge Story tells us that:

> From the moment, when principles of decision came to be acted upon and established in chancery, the Roman law furnished abundant principles to erect a superstructure at once solid, convenient, and lofty, adapted to human wants, and enriched by all the aids of human wisdom, experience, and learning. To say that later chancellors have borrowed much from these materials, is to bestow the highest praise upon their judgment, their industry, and their reverential regard to their duty. It would have been little to the commendation of such learned minds, that they had studiously disregarded the maxims of ancient wisdom, or had neglected to use them, from ignorance, from pride, or from indifference. (1 Story's Equity, Sec. 23.)

In determining the question whether the defendant has made a reasonable use of the waters of Kern River, we are not without the same kind of precedents which have been followed in new cases from the earliest history of the common law. The universal custom, in arid countries, of

diverting flowing water for the purpose of irrigation, furnishes a precedent applicable to Kern County. The recognition of the principle that priority of appropriation is the foundation of priority of right in all the Pacific States and Territories, is most persuasive in the case at bar. These laws and customs are the natural growth of necessity. The arid sections of the United States furnish much valuable information to guide this Court. Arizona, New Mexico, Colorado, Dakota, Montana, Wyoming, and Utah, are all situated in this arid section. Each of them has a complete system of irrigation, founded on the principle of appropriation.

Professor Pomeroy, in his series of articles on water rights, in speaking of the legislation of Colorado and the Territories above named, says:

> It is enough to say that in each of these commonwealths, the statutes have covered the whole ground, entirely displacing the common-law doctrines; and the labors of their courts will be confined to the proper construction and application of the statutory rules. Without attempting any further examination of these statutes, which so completely displace the common-law doctrine, I shall confine myself to the law concerning riparian rights, riparian proprietors, and the use of streams flowing through private lands, in the commonwealths which have not adopted these complete statutory systems, and settled all questions of right by legislation. These commonwealths are the States of California and Nevada. (2 *West Coast Rep.*, 595.)

Professor Pomeroy was mistaken in regard to the legislation of California. We will hereafter

show that the irrigating sections of this State have as comprehensive a system of irrigation provided by statutes, as any commonwealth in the United States.

The Professor, in giving a synopsis of the legislation of the States and Territories where irrigation is practiced, failed to observe the great body of legislative enactments governing the subject of irrigation in California. The only statutes to which he referred were Sections 1410 to 1423, of the Civil Code, and the Act of 1872 to promote irrigation, printed in the appendix of Hart's Edition of that Code, pp. 474 to 478. His synopsis of these laws will be found in 2 *West Coast Rep.*, p. 377 to 383, and 497 to 503, and also 593. The statutes of California, omitted by Professor Pomeroy, will be discussed further on in this argument.

Colorado.

Colorado, by legislation and judicial decisions, has perfected a system of rules and regulations for the distribution of water for irrigation, which furnishes the best model existing in any part of the world. It is instructive to peruse the judicial decisions of Colorado on this subject. In *Coffin* vs. *Ditch Company*, 6 Col., 446, the Court says:

> It is contended that the common-law principles of riparian proprietorship prevailed in Colorado until

1876, and that the doctrine of priority of right to water by priority of appropriation thereof was first recognized and adopted in the Constitution. But we think the latter doctrine has existed from the date of the earliest appropriations of water within the boundaries of the State. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity.

Water in the various streams thus acquires a value unknown in moister climates. Instead of being a mere incident to the soil, it rises, when appropriated, to the dignity of a distinct usufructuary estate or right of property. It has always been the policy of the National, as well as the Territorial and State Governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. Houses have been built and permanent improvements made, the soil has been cultivated, and thousands of acres have been rendered immensely valuable, with the understanding that appropriations of water would be protected. Deny the doctrine of priority or superiority of right by priority of appropriation, and a great part of the value of all this property is at once destroyed. * * * * We conclude, then, that the common-law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he make no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict therewith. (6 Col., 446.)

These views of the Supreme Court of Colorado are broad and comprehensive, and illustrate the elasticity of the common law. They remind us of the decisions of the Supreme Court of California, which form the basis of mining law and the law governing the use of water throughout

all the States and Territories west of the plains of Kansas and Nebraska.

For the purpose of illustrating the method adopted in California in applying the common law to the conditions found here, we call attention to the celebrated case of *Irwin* vs. *Phillips*, 5 Cal., 146, in which the Court said:

> Courts are bound to take notice of the political and social condition of the country which they judicially rule. In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State Governments, and with the exception of certain state regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res adjudicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers;

as for instance, in the Revenue Act, 'canals and water-races' are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining. Section 2 of Article IX of the same Act, providing for the assessment of the property of companies and associations, among others mentions 'dam or dams, canal or canals, or other works for mining purposes.' This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, *qui prior est in tempore, potier est in jure.* The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection.

Other Irrigating Countries.

This Court is not confined to the Pacific States and Territories for examples showing how water must be used in arid countries, and what the sense of mankind, as evidenced by custom, by statutes and by edicts, has always regarded as a reasonable use of water for irrigation. In no arid country where irrigation is a necessity has flowing water been allowed to run to waste.

In India, more than one hundred and fifty mill-

ions of people subsist by irrigation. Englishmen have ruled India for many generations, but they have not attempted to distribute flowing water in that country according to the customs of the British Isles. On the contrary, they have inaugurated a system of irrigation and distribution of water in accordance with the usages and customs of other arid countries. The example furnished by India is not weakened as a precedent by the fact that India is governed by arbitrary power. On the contrary, it shows that no human power can reverse the order of nature. If Englishmen in India must conform to the laws and customs of other arid countries, why should not the descendants of Englishmen in America do the same? Less necessities exist for irrigation in France than in California.

Hall on Irrigation, 129.

The average rainfall is nearly double and is more regularly distributed throughout the season than with us, yet, irrigation is regarded as highly beneficial in France. After a struggle of hundreds of years, it is now the law of that country that water may be distributed for irrigation among all land-owners over whose land it can be made to flow. Any preference given to the owners of the banks over the owners of other lands is more theoretical than real.

Hall on Irrigation, 52.

Irrigation in Northern Italy has been practiced since the time of the Roman Republic. By the Roman law, flowing water was *publici juris*, and was diverted and distributed for use for irrigation by individuals, by authority obtained from the government. Through all the change of rulers in Italy, the authority of the government to regulate the use of flowing water has never been denied. (See R. Baird Smith's work on Italian Irrigation, published by authority of the East India Company, p. 131.)

The great valley of the Po is more like the Sacramento and San Joaquin valleys in form and size than any other valley of which we have any description, except that the valley of the Po has, on an average, from 75 to 100 per cent. greater annual rainfall than the great valley of California.

Hall on Irrigation, 167.

Here again we find the people following the law of nature and the law of necessity, in distributing the water over all arable land, without regard to its immediate proximity to the streams. Every arid country inhabited by man furnishes similar examples to guide us to a correct conclusion.

The universal custom of mankind since prehistoric times, in all arid countries, of diverting flowing water from its natural channel, and causing it to be absorbed in fertilizing the land, establishes

the fact which is the purpose of this argument: that the use of water for irrigation, in countries where such use is essential for the existence of man, is a reasonable use, and therefore, according to the common-law. It also proves that it would be unreasonable and unjust to place it in the power of any landowner to require all the water of a stream to flow over his land and run to waste below, while his neighbor above was starving for the want of water to irrigate his land; therefore, according to the common law, no such right or power can exist where irrigation is essential.

Kern Valley.

The valley of the Kern must be classed among the most arid countries inhabited by man. Its annual rainfall is only about four inches. The record in this case discloses the fact that the lands in this valley can only be utilized by irrigation. This is true of the lands of both plaintiffs and defendant. While it may be true that some cattle could subsist in the swamps of Buena Vista Slough, if those swamps were restored to their original condition, it is manifest, if so restored, they could not be inhabited by man. It would be a fraud on the State and the United States to require these lands to be again converted into swamps. It was the policy of the State and of the General Gov-

ernment to render these swamps fit for habitation. For that purpose they were granted to the State. The other lands in Kern Valley were dry, arid deserts, and the Government disposed of them on the condition that the purchasers should fertilize them by means of irrigation.

Conduct and Claims of Plaintiffs.

The conduct of the plaintiffs in consenting to and in aiding in the construction of the East Side Canal and the Kern Valley Water Company's Canal, which can only be useful in irrigating plaintiffs' land, shows that they proposed to use the waters of Kern River to irrigate their reclaimed lands. The claims set up by plaintiffs to the water in controversy, on the ground that they desire to have it flow as it was accustomed to flow through the swamps of Buena Vista Slough into Tulare Lake, is a false and sham pretext. They seek to take advantage of their situation as owners of the land bordering on Tulare Lake. There is no landowner below them who can compel them to restore the water to the place of its original flow. If they can cause all the waters of Kern River to be turned into their swamp, they will then have ample supply for their ditches, and more than ample supply of water to irrigate their reclaimed lands; and the doctrine which they invoke for the

destruction of their neighbors cannot be invoked against them, because they border on the lake. If they may thus take advantage of their position any person owning a few acres of land at the mouth of any of our great rivers may depopulate the interior, by denying the inhabitants the right of irrigation. The record in this case shows that the water diverted by the defendant was necessary for the irrigation of the desert land, for which the Calloway Ditch was constructed, and that the amount of water taken was reasonable. And the Court further finds that there is abundant water in Kern River during the irrigating season for both plaintiffs and defendant, and that during the non-irrigating season the water would sink before it reached the land of the plaintiffs, if none were taken out of the river by the defendant. The plaintiffs contend that these equitable circumstances have nothing to do with this case; that, as a matter of cold arbitrary law, thay have a right to require all the water of Kern River to pass through the Buena Vista Swamps, whether they are benefited thereby or not.

We answer this unjust and unreasonable claim by denying that there ever was any such law in California. Under the common law, and without reference to customs or statutes, the defendant might take from Kern river all the water reasonably necessary to supply the natural want of irri-

gation. The concurrence of all the authorities sustains the defendant in this ordinary use of water, and by the weight of authority, defendant might take all the water, if necessary, for the purpose of irrigation; such use of water being essential to man's existence in Kern County.

Gould on Waters, Sec. 205, and cases there cited.

Monopoly.

The rule of the Pacific States and Territories making priority of appropriation the test of priority of right, tends to avoid monopoly. No more water can be acquired by appropriation than is necessary to supply actual wants. The surplus belongs to the next appropriator or to the public. It is the duty of the Court to see that no water is wasted, and to limit each appropriator to his actual necessities. If water is appropriated for sale, the consumers, by the Constitution, have the power to fix the price. If they pay too much it is their own fault. On the other hand, the adoption of the English doctrine of riparian rights, in arid countries, leads to the monopoly of all flowing water in such countries. The power of a single land owner on a stream, under that doctrine, "to play the dog in the manger," has no such constitutional limitations against monopoly as are

provided in the New Constitution, where water is appropriated for sale, rental, or distribution.

Legislation.

The positive legislation of the State fixes and determines the rights of the parties to this action. Section 1410 of the Civil Code declares that "The "right to the use of running water, flowing in a "river or stream, or down a cañon or ravine, may "be acquired by appropriation."

The following sections, from 1410 to 1422, both inclusive, provide for what purposes water may be appropriated, and the manner of making such appropriation. Section 1422 declares that "The "rights of riparian proprietors are not affected "by the provisions of this title." This section can have no application to the water in controversy, for reasons already given, wherein we have shown that, under the common law, such riparian rights as are claimed by plaintiffs never existed in Kern County. The common law never tolerated a claim of a riparian proprietor or any one else to desolate a country for no useful purpose. We might rest here without reference to any legislation of California except the Code. But all the legislation of the State on this subject is in *pari materia*, and must be construed together, and when so construed, it conclusively

establishes the main proposition that the right to flowing water in Kern County is acquired by appropriation.

There are over fifty acts of the Legislature on the subject of irrigation. The first of these Acts was passed on the 15th day of May, 1854, and the last on March 26, 1880. The balance were passed from time to time between those dates. We print at the end of this argument a synopsis of these acts, found in the Surveyor General's Report of 1882. We have also printed in an appendix, for convenience of the Court, a portion of these Acts in full, which we present herewith.

This legislation is all local, and confined to such counties as the Legislature deemed arid and requiring irrigation.

The first of these Acts was passed before the passage of any act for the sale of swamp lands in this State, and before any lands of the United States in Kern Valley were sold. It applied to the counties of San Diego, San Bernardino, Santa Barbara, Napa, Los Angeles, Solano, Contra Costa, Colusa, and Tulare. The valley of the Kern was a part of the County of Tulare at the time of the passage of this Act.

Afterwards, from time to time, and before the adoption of the Code, this class of legislation was extended by various other acts to the following additional counties; namely: San Luis Obispo,

Tehama, Sonoma, Santa Cruz, Merced, Fresno, Yolo, and Siskiyou. These laws were continued in force by the 19th Section of the Political Code.

Most extensive powers were conferred upon the Commissioners. They controlled all watercourses for the purpose of distributing water for irrigation among all the land owners in each district, without regard to the proximity of their lands to the streams.

To illustrate the general character of the powers conferred upon the Water Commissioners by this legislation, we give several examples, as follows:

AN ACT

Creating a Board of Commissioners and the office of Overseer, in each Township of the several Counties of this State, to regulate Watercourses within their respective limits.

[Passed May 15, 1854. Statutes 1854, p. 180.]

SEC. 3. The duties of the Commissioners shall be to examine and direct such watercourses, and apportion the water thereof among the inhabitants of their district, determine the time of using the same, and upon petition of a majority of the persons liable to work upon ditches, lay out and construct ditches, as set forth in such petitions.

AN ACT

To create a Board of Water Commissioners in the County of San Bernardino, and to define their duties.

[Approved February 18, 1864. Statutes 1863-4, p. 87.]

SEC. 2. The duties of the above Commissioners shall be:

First—They shall appoint as many Overseers as they may deem necessary for the proper regulation of the watercourses and ditches in said county, and shall have power to revoke the same at pleasure.

Second—Upon a petition of a majority of those interested, or who own legitimate claims on any ditch, they shall lay out any ditch or ditches and apportion the water thereof among the persons using the same in proportion to the amount of land each person may wish to irrigate; *provided*, there should be water sufficient in said ditch for the irrigation of all said land; but in case there should not be a sufficient amount of water for said irrigation in any such ditch, upon a petition of a majority of those holding such interests, as aforesaid, the Water Commissioners shall immediately reapportion, without prejudice to any prior occupation, the water thereof; and any person who shall have put in for more land to irrigate than his proportion, according to the pro rata of water in the ditch or stream from which he is furnished with water, a reapportionment shall immediately be made as provided in this section.

Third—Upon the receipt of the returns of the Overseers, of the number of acres to be irrigated and the amount of water in said ditch to be used for irrigating purposes, and the probable number of days' work required to be done on any ditch in that season, they shall apportion the work thereof among the persons required to perform the same.

Fourth—[They] shall, as soon as they have apportioned the water, make a schedule stating the hours that each person shall be entitled to use the water, commencing at the head of each ditch; also, opposite the name of each person, the number of days' work he shall be required to perform.

Fifth—[They] shall keep a book in which they shall record in full all the official acts of said Board, which book shall be furnished by the Board of Supervisors, at the expense of the county, and shall be transferred to their successors in office.

AN ACT

To create a Board of Water Commissioners in Tulare County, and to define their powers and duties.

[Approved April 4, 1864. Statutes 1863-4, p. 375.]

SEC. 2. The duties of said Commissioners shall be as follows:

First—They shall elect one of their number Chairman, and one as Clerk of the Board; they shall, from time to time, appoint as many Overseers as they may deem necessary for the construction of the water ditches and the care of watercourses, and define the boundaries within which they shall act in the county, and they may revoke such appointments at pleasure.

Second—Upon a petition of a majority of the citizens of any district or neighborhood, they shall lay out such ditch or ditches as may be necessary to irrigate the land in cultivation in the district, and apportion the water in the same to each individual in proportion to the land cultivated by each; *provided*, that should the water be insufficient for a continuous supply to all, the Commissioners shall, upon the petition of a majority of those interested, re-apportion the same without prejudice to any.

Third—No ditch shall hereafter be taken out of any stream in the waters of which different persons have an interest, without leave of said Commissioners; and upon the receipt of an estimate from the Overseers, or upon an estimate of their own, of the number of days' work necessary to construct or repair any ditch and of the amount of land proposed to be irrigated by each individual using water therefrom, the Commissioners shall apportion such labor amongst those interested in proportion to the amount of water required by each, and should such labor fail to complete the work, they may immediately make a new assessment in the same proportion.

Fourth—They shall, as soon as they have apportioned the water, make a schedule of the hours which each person is entitled to use the same, commencing at the head of each ditch, and also the amount of labor performed or to be performed, and a copy of said schedule

shall be posted at the head of the ditch, and such apportionment shall be binding, unless modified by the unanimous consent of those interested.

Fifth—A book shall be furnished by the Board of Supervisors of said county in which said Commissioners shall keep a full record of all official acts of said Board, which shall be open to the inspection of any citzen, and shall be delivered over to their successors in office.

Tulare County included Kern Valley at the time the Act of 1864 above set forth was passed. These acts provide in detail for the condemnation of rights of way, for the protection of ditch property and watercourses, and for the construction of ditches and canals; in short, in the counties named, there is, and has been in existence since 1854, a complete system of irrigation. This system was predicated upon the right of the State to pre-determine by legislation how water should be used in the counties named, while both the land and the water belonged to the State or the United States.

It has been suggested that there are reservations in these acts in favor of persons below on the stream. It is true that there are reservations, but it is not true that there is in any one of these acts, a reservation in favor of any person as against the power of the Commissioners. Nor is it true that there is in any one of these acts, a reservation in favor of the rights of riparian proprietors. No such rights are mentioned in any act

except the Civil Code. These reservations must have been intended to protect the rights of prior appropriators, if any there were, on the stream below, as against persons not authorized by the Commissioners to divert water. In no case could these reservations affect Kern Valley, for there were no land owners or appropriators on Kern River at that time.

There is very little difference in the language of these reservations in the several acts. In some, the reservations are in favor of persons located on the stream below, while in others, persons using the waters on the stream below are protected.

We herewith give examples of these reservations, as follows:

Act of May 15, 1854:

SEC. 14. No person or persons shall divert the waters of any river, creek, or stream, from its natural channel, to the detriment of any other person or persons located below them on any such stream. (Statutes of 1854, p. 180. Appendix, page 1.)

Act of March, 1857, for San Bernardino County:

SEC. 13. No person or persons shall divert the waters of any river, creek, or stream, from its natural channel, to the detriment of any person or persons using said waters below, on any such river, creek, or stream. (Statutes of 1857, p. 63. Appendix, page 5.)

The 8th section of the Act of April 13th, 1860, for Merced County, reads as follows:

No persons or persons shall divert the waters of any river, creek, or stream, from its natural channel, to the detriment of any person or persons using said waters below, on any such river, creek, or stream. (Statutes of 1860, p. 182. Appendix, page 9.)

The terms, " using such waters on the stream below," and " persons located on the stream below," appear to have been used in the statutes as synonymous. They are used indiscriminately in the several acts. If we construe these reservations as referring to such riparian rights as exist in England, and also construe them as limiting the power of the Commissioners to divert water, the legislation is self-destructive.

Such a construction would make these acts contradictory and absurd. Unless we regard this legislalation as establishing another and different system for the use of water from that existing in England, these acts have no force. The two systems are radically and essentially different. Under one system, water is allowed to flow in its original channel, because it is more beneficial for domestic purposes, water power, and the like, to permit it to flow there. Under the other system it is necessary to distribute the water over the land, because that is the most beneficial use.

The right of appropriation and the English rights of riparian proprietors cannot both exist on the same stream. We must, therefore, con-

strue these reservations as applicable to the rights of prior appropriators, and to no other rights.

The Code was passed while these laws were in force in the counties named. If the reservation in Section 1422 deprived the Water Commissioners of the power to regulate water for irrigation, and gave to any land owner the power to force all the water back into the stream, why were these local acts continued in force?

They have no effect if Section 1422 has any application to the irrigating sections of the State. The only natural construction that can be given to Section 1423 is to let it apply to those parts of California where no local legislation exists, such as the northern coast, where the climate more nearly resembles that of England than any other part of the State. It is probable that there are sections of this State where the climate is such as to make the English rules for the use of water desirable. At all events, the Legislature has discriminated between the different sections of the State in all its legislation in regard to water, except the Code, if that be an exception. Why should it be an exception? Why not construe it according to its obvious meaning, when read in the light of the legislative policy of the State? Why not apply it where it is probable that riparian rights may exist, and not attempt to apply it for the destruction of the

rights of appropriators who have conformed to the laws of the State, and have acquired vested rights under those laws?

It must be borne in mind that all these special acts are still in force, and if there is any conflict between them and the general law found in the Civil Code, the general law must give way to these special acts.

Wood vs. *Commissioners*, 58 Cal., 561.

The Act of '76.

We call particular attention in connection with the appropriation of the defendant, to the Act of 1876. We have already seen that in 1875, in pursuance of the provisions of the Code, the grantors of defendant made an appropriation of the water in controversy, for distribution on the lands described in the notice, and that while defendant was in the actual possession of the water so appropriated, it was enacted by the 4th Section of the Act of March 29th, 1876, that—

> Any person or persons desiring to construct a ditch and appropriate water for irrigation, manufacturing, or mining purposes, shall file a petition with said Commissioners, setting forth the stream from which they intend to take the water, the point where the proposed ditch will commence its general course, and the proposed size thereof; whereupon the said Commissioners may grant the right to construct the said ditch, and to use water sufficient to fill the same, for the uses and purposes set forth in said petition; *provided*, THAT NOTHING HEREIN CONTAINED SHALL BE SO CONSTRUED AS TO

AFFECT THE RIGHTS AND PRIVILEGES OF THOSE WHO, BY PRIOR APPROPRIATION AND BY ACTUAL USE, HAVE SECURED THE RIGHT TO THE USE OF WATER FROM THE SEVERAL RIVERS AND STREAMS OF FRESNO, TULARE, AND KERN COUNTIES. (Statutes of 1875–6, p. 547. Appendix page 75.)

If Section 1422 of the Civil Code ever had any operation in Kern County, which we deny, it certainly was repealed by the 4th Section of the act of March 29, 1876, above quoted. That act authorizes the Commissioners to grant the right to construct ditches and to use sufficient water to fill them. It makes no reservation of riparian rights, but does make a most complete reservation of all rights acquired by appropriation. It expressly declares that nothing contained in the act shall be so construed as to affect the rights and privileges of those who, by prior appropriation, and by actual use, have secured the right to the use of water from the several rivers and streams of Fresno, Tulare, and Kern Counties. It expressly repeals all acts and parts of acts in conflict with its provisions. This act recognizes, in the strongest possible language, the rights and privileges of those who, by prior appropriation, and by actual use, have secured the right to use the water from the rivers and streams of the counties named. It matters not that this act was passed subsequent to the appropriation made by the defendant. The act recognizes the fact that the right to the use of water is acquired by appropria-

tion and not otherwise. The appropriation of defendant was made in strict conformity to the Civil Code. The act specially protects the rights of prior appropriators under the Code. It utterly abrogates the common law doctrine of riparian rights as understood in England. If the Legislature had not intended to declare that riparian rights did not exist in the counties named, it would not have passed a law utterly subversive of such rights. At the time this act was passed, the waters of the streams in the counties named were largely appropriated, and the act recognizes such appropriation as valid, and authorizes the balance of the water in such streams to be appropriated. The Legislature assumed that no rights existed except those acquired by appropriation. This special enumeration of the rights to be protected, excludes any presumption that other rights were reserved. It would be absurd to contend that the Legislature intended to protect the rights of riparian proprietors against all persons who had appropriated water in the counties named, prior to the passage of the Act of 1876; and at the same time, to authorize all persons appropriating those waters after that date to take all the water of the streams without regard to the rights of riparian proprietors.

State Policy.

Any recognition of the doctrine of riparian rights in Kern County would be in violation of the uniform legislative policy of the State. That policy is so well expressed in a memorial of the Legislature to Congress of March 6, 1878, that we invite the attention of the Court to its unmistakable language. It as follows:

Whereas, The climate of the States and Territories lying near and west of the Rocky Mountains is generally dry, and in many districts comparatively rainless, so that fresh water is often insufficient in quantity for the complete cultivation of the soil, and in many localities inadequate for any purpose; and, whereas, the common law rule as to water and watercourses, and riparian ownership, founded upon the customs of a people settled in a wet and humid climate, and which permits ownership and property rights in water independent of its being applied to any beneficial use, leading to the anomaly of the land-owner exercising the right of allowing the same to run to waste when his neighbor is actually suffering for the want of it, is detrimental to the development, prosperity, and welfare of the Pacific States and Territories, by encouraging and legalizing the monopoly of and speculation in the element so essential to the comfort and welfare of the people; therefore, resolved by the Assembly, the Senate concurring, that the Legislature of California earnestly urges upon the attention of Congress the evils that threaten the new States and Territories growing out of the monopoly, by private individuals and corporations, of the fresh water and sources of water supply still remaining upon the public lands.

Resolved, That in the opinion of the Legislature of California it is essential to the settlement, growth, and prosperity of the region in and west of the Rocky Mountains, and especially the Pacific States and Territories, that the fresh water of all rivers and streams of sufficient magnitude to supply more than one family for do-

mestic and agricultural uses, and all lakes and ponds with an area of more than one acre in extent, shall be reserved from sale or grant in exclusive ownership, and that the same be granted and dedicated to the States and Territories where the same are situated, for the free and common use of all the inhabitants, for the natural purposes of drinking and washing for man and the domestic beasts, for irrigating the soil, and for mining purposes.

Resolved, That our Senators are instructed, and our Representatives requested, to use all constitutional and proper means to procure the passage of a law granting, reserving, and dedicating all fresh waters running upon the public lands of the United States to the States and Territories where the same are situated, for the purposes hereinbefore set forth.

Resolved, That the Governor is hereby requested to cause copies of this resolution to be duly certified and authenticated, and to transmit the same to our Senators and Representatives in Congress. (Statutes of 1877–8, page 1070.)

In pursuance of this policy, the people of this State, in 1879, adopted a Constitution in which we find the following provision:

ARTICLE XIV.

SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law.

It is assumed in this provision of the Constitution that all water which had been appropriated was rightfully appropriated, and that the right to the use of flowing water was acquired by the act of appropriation. At that time the defendant had made the appropriation of the waters of Kern

River which the respondent now claims adversely. (See Findings 53, 60 and 61.)

The water was appropriated for distribution upon the land along the west bank of Kern River commanded by the Calloway Canal, and described in the notice of appropriation. (See Findings 53, 60 and 61.)

By the terms of the Constitution, as above quoted, the water diverted by the Calloway Canal became and was subject to legislative control, and in pursuance of this provision of the Constitution, the Legislature at the session then next ensuing, passed an act conferring the power on the Boards of Supervisors in their several counties to fix the price of all water appropriated for sale or distribution, and to regulate the use of the same.

Statutes of 1880, page 59.

Statutes Affecting Defendant's Appropriation.

The statutes relating to the appropriation of the waters of Kern River by the defendant may be thus summarily stated:

In 1875, the water which supplies the Calloway Canal was located, claimed, and appropriated in pursuance of the provisions of the Civil Code, for the purpose of distribution over certain lands described in the notice of appropriation. In 1876 the Legislature authorized the appropri-

ation of all the waters of Kern River, reserving and confirming the appropriation already made by the defendant in 1875. In 1879, the New Constitution adopted by the people, declared that water so appropriated was a public use, such use to be regulated by the Legislature. In 1880 the Legislature passed a law providing for the regulation of the use of the water so appropriated by the defendant, and in pursuance of said regulation and the Constitution and the laws, the water of the Calloway Canal is now being used by the owners of the land for the benefit of which the appropriation was made.

Can it be said with any show of reason that the State of California, by its legislation and its Constitution, intended that any alleged common law rule should be enforced by the Courts against these statutes and this Constitution, so as to take the water diverted by the Calloway Canal from the persons now using the same, and return it to the swamps of Buena Vista Slough for the purpose of relegating those swamps to their original condition and making them unfit for settlement or for cultivation?

Construction.

We repeat, that if all parts of the statute are to be so construed as to have force or effect, the reservation of riparian rights must have applica-

tion solely to the non-irrigating sections of the State. The fact that every act of the Legislature with regard to the use of water passed prior to the Civil Code is local, seems to furnish a sufficient explanation of the meaning of the reservation in Section 1422.

The law of appropriation provided for in the Code must apply to those sections of the State, where, by statutes and customs before the adoption of the Code, the right to the use of water was founded upon prior appropriation. The reservation of riparian rights must be confined to those sections of the State where irrigation is unnecessary and where the climatic conditions resemble those of England. This construction of the reservation in Section 1422 is not only in harmony with the statutes, but is and has been in accordance with the usages and customs of the State for more than thirty years. The assumption of the respondents that riparian rights exist alike on all streams in the State is subversive of the legislation of the State, and the usages and customs of the people. It strikes a fatal blow at the property rights of the people, without conferring the slightest benefit upon any one. The construction for which we contend gives that section its full force and meaning, and leaves those portions of the State where irrigation is unnecessary to be regulated by the rules of law

applicable to wet and moist countries. The fact that the Legislature had never extended its irrigation laws and the right of appropriation to the non-irrigating sections of the State, furnishes abundant reasons for the saving clause found in Section 1422. No statutes having been passed providing for irrigation in the counties on the northern coast of California, it might have been presumed that in those sections the doctrine of riparian rights had been recognized. The manifest object of Section 1422 was to save such rights, if any existed. Nothing could be more in conflict with the common law than to apply the same rules for the use of water to all streams in the State. It has never been done by any country governed by the common law. The whole doctrine of reasonable use, as we have already shown, is founded on a different rule for every change of circumstance—what would be a reasonable use on one stream would not be reasonable on another differently situated. As before stated, what is reasonable use of the water of a stream must depend on the climate, the size of the stream, its volume, its fall, the customs of the locality, the state of manufactures, the density of the population, the habits of the people, and all the circumstances which may exist in the locality.

Merrifield vs. *Worcester*, 110 Mass., 216.

Gould on Waters, Sec. 208.
Angell on Watercourses, Sec. 117.

Special Legislation.

It has been suggested that the Constitution prohibits special legislation, and that, therefore, we cannot have different laws for different sections of the State. There are two good answers to this objection:

1. These local systems of irrigation were established before the adoption of the present Constitution.

2. The Constitution does not prohibit special laws where general laws are inapplicable.

Much of the recent difficulty in obtaining legislation suitable for irrigation arose from an effort to comply with the erroneous doctrine that the Constitution requires all laws to be general. Is it not reasonable that persons residing in sections of the State where irrigation is not practical should object to the repeal of Section 1422 of the Civil Code? That section saves all rights of the bank-owners where such rights exist, but cannot affect those sections of the State where the right of appropriation is established by law.

The arid portions of the State have no more right to impose upon the wet and humid sections laws unsuitable to their wants and necessities

than the people of the Northern Coast have to inflict laws upon Kern County, which would convert it into a desert.

Are these Acts Constitutional?

The fact that California, Colorado, Wyoming, Dakota, Montana, Idaho, Utah, New Mexico, and Arizona, have, in their legislation, assumed the right to control the use of water, and that each has a system which the Courts enforce, is a strong argument in favor of the constitutionality of these laws.

The acts regulating irrigation are analogous to the legislation of many of the Eastern States for the encouragement and support of mills. The general provisions of the Mill Acts are described in Angell on Water Courses, 6th Ed., Sec. 478 to 509.

These acts not only regulate the use of water for milling purposes, but they authorize land owned by citizens to be flooded for the benefit of other citizens. There has been much discussion as to their constitutionality. In many of the States they have been sustained as an exercise of the power of eminent domain, but it was difficult to make it appear that the taking was for public use. The Supreme Court of Massachusetts, at an early day, found authority for the passage of these laws in the police power of the State.

In *Head* vs. *Amoskeag Manufacturing Co.*, Supreme Court Rep. of Feb. 23, 1885, Vol. 5, Part 12, page 441, the Supreme Court of the United States, in a most able and elaborate opinion, vindicated the constitutionality of this class of legislation under the police power of the State. The case arose in the State of New Hampshire, and the act in question is printed in the report, together with a list of the Mill Acts of the several States. In delivering the opinion of the Court, Mr. Justice Gray said:

> The question whether the erection and maintenance of mills for manufacturing purposes under a general mill act, of which any owner of land upon a stream not navigable may avail himself at will, can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use, in the constitutional sense, is so important and far-reaching, that it does not become this court to express an opinion upon it, when not required for the determination of the rights of the parties before it. We prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all, and to the public good, is within the constitutional power of the legislature. When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.
>
> In the familiar case of land held by several tenants in common, or even by joint tenants with right of survivorship, any one of them may compel a partition, upon which the court, if the land cannot be equally

divided, will order owelty to be paid, or, in many states, under statutes the constitutionality of which has never been denied, will, if the estate is such that it cannot be divided, either set it off to one and order him to compensate the others in money, or else order the whole estate to be sold. * * *

The statutes which have long existed in many states, authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have Commissioners appointed to drain and improve the whole tract, by cutting ditches, or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. * * *

By the maritime law, based, as Lord Tenderden observed, on the consideration that the actual employment of ships is "a matter, not merely of private advantage to the owners, but of public benefit to the state," and recognized in the decisions and the rules of this court, courts of admiralty may, when the part owners of a ship cannot agree upon her employment, authorize the majority to send her to sea, on giving security to the dissenting minority to bring back and restore the ship, or, if she be lost, to pay them the value of their shares; and in such case the minority can neither recover part of the profits of the voyage nor compensation for the use of the ship. * * *

But none of the cases, thus put by way of illustration, so strongly call for the interposition of the law as the case before us.

The right to the use of running water *is publici juris*, and common to all the proprietors of the bed and banks of the stream from its source to its outlet. Each has a right to the reasonable use of the water as it flows past his land, not interfering with a like reasonable use by those above or below him. One reasonable use of the water is the use of the power, inherent in the fall of the stream and the force of the current, to drive mills. That power cannot be used without damming up the water, and thereby causing it to flow back. If the water thus dammed up by one riparian proprietor spread over the lands of others, they could at common law bring successive actions against him for the injury

so done them, or even have the dam abated. Before the mill acts, therefore, it was often impossible for a riparian proprietor to use the water-power at all, without the consent of those above him. The purpose of these statutes is to enable any riparian proprietor to erect a mill and use the water-power of the stream, provided he does not interfere with an earlier exercise by another of a like right, or with any right of the public. (5 Supreme Court Rep., 445.)

Mexican Grants.

The right of the State to control the use of water is not affected by the source of title to the lands over which it flows. A Mexican grant is not exempt from the power of the Legislature to regulate the use of water. That power has always been exercised by every government as a part of its police power. Lands acquired from the Mexican government are subject to the jurisdiction of the State in the exercise of its police power equally with any other lands. Upon this point Prof. Pomeroy wrote an elaborate article in 2 West Coast Rep., 803–805, wherein he demonstrated that the source of title did not affect the question of the right of the State to legislate upon this subject. The Supreme Court of the United States, in *Hagar* vs. *Reclamation District No.* 108, 111 U. S., 701, passed upon the constitutionality of the Act of April 1st, 1872, to promote irrigation. This act provided for both reclamation and irrigation districts, and Hagar's appeal to the Supreme Court of the

United States was from the action of a reclamation district. And one of the points made was that the land in question, being a Mexican grant, the State had no power to authorize its incorporation into a reclamation district. In delivering its opinion, the Court said:

> The fact that the appellant's land was derived from a grant of the Mexican government in no respect affects the question. It is the character of the land and its susceptibility of being reclaimed under one system of works, and not the source of the owner's title, which authorize the action of the State. The lands granted by Mexico were not by the treaty, under which California was acquired, exempted from the control that the State exercises over all other lands. (111 U. S., 706.)

If the owners of Mexican grants have any other or different rights from other landowners, they must have acquired such rights either from the United States or Mexico. They acquired nothing from the United States. The title they have was derived from Mexico. The patent issued by the United States is only a quit-claim deed, issued for the sole purpose of segregating the public lands from the lands granted to private persons by the Mexican government.

Adam vs. *Norris*, 103 U. S., 591.
Beard vs. *Federy*, 3 Wall., 478.
Henshaw vs. *Bissell*, 18 Wall., 255.

They certainly acquired no special privileges from Mexico. The theory of the Mexican law was

the same as the Roman in respect to the original ownership of flowing water. All such water, except springs on private lands, belonged to the government, and was distributed according to laws made for that purpose. If preference was at any time given to the bank owners, it was because the governing power regarded such preference as reasonable, and not because the owners of the land had any right to the use of flowing water as against the State, by virtue of such ownership.

Hamilton's Mexican Law, p. 125.

Hence it follows that the owners of Mexican grants have no rights which deprive the State of the power to regulate the use of flowing water.

Vested Rights Based Upon Custom.

The custom in the arid sections of the Pacific States and Territories, of acquiring the right to the use of flowing water by appropriation, has so long prevailed that a change at this late day would produce great hardship and disturb vested rights. It would take a generation before the people of California could be induced to acknowledge as law, so unreasonable and unjust a mode for the distribution of water as would permit a single selfish land owner, on a running stream, to ruin all who might reside upon the stream above him, by conferring upon him the arbitrary power

to require the full flow of the water of such stream to pass over his land, in its natural channel, where it would confer no benefit upon him or any one else.

More than a quarter of a century ago this custom of appropriation was frequently and eloquently discussed by the Supreme Court of this State, and declared to be in accordance with the common law. In *Conger* vs. *Weaver*, 6 Cal., 548, Judge Heydenfeldt said:

> Every judge is bound to know the history and the leading traits which enter into the history of the country where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must, therefore, know that this State has a large territory; and upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the Government; that but little, as yet, has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously, from a period anterior to the organization of the State Government to the present time; upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted watercourses; and, indeed, have done, in the various enterprises of life, all that is usual and necessary in a high condition of civilized development.
>
> * * * * * * *
>
> Now, can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have aquired rights, these rights rest upon doctrine of presumption of a grant of right, arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both. (6 Cal., 557.)

If Judge Heydenfeldt could have had the picture now spread before this Court to describe, he would have charmed us with a glowing panorama of ditches and canals of flowing water, vineyards and orange groves, cultivated fields abounding in all the fruits, cereals, and vegetables known in semi-tropical countries, quiet homes and stately edifices constructed with all the skill of modern art, schoolhouses and churches for all denominations of Christians—a panorama extending from Stockton to San Diego—and all produced by the magic power of water.

If there is any common law which would require this picture to be blotted out and these fertile fields to relegated to desert wastes, it is not the common law which grew with the growth of the Anglo-Saxon race, developed with the development of new industries, new countries, and new civilizations; and conformed in all climates and in all countries to the wants and necessities of English speaking people, during all the time required for the inhabitants of the British Isles to emerge from barbarism and become the most powerful and enlightened race on the globe.

The limits of this argument will not permit us to cite the numerous decisions of the Supreme Court of this State, and of the United States, recognizing the right of appropriation of flowing water, and making priority of appropriation a test

of priority of right. It is sufficient to say that there has been no other rule governing the use of water in the arid region acquired from Mexico, except in Nevada, since the acquisition of that territory.

Supreme Court of California.

We call attention to the cases decided by the Supreme Court of this State, and cited by the respondents' counsel, and claimed by them as authority against the right of appropriation. We deny that this Court has ever decided the questions now under consideration adversely to our contention.

The fact that irrigation is a necessity in the arid sections of this State has never been presented in any case and considered in connection with the local statutory regulations for the distribution of water in those sections.

The three principal questions involved in the record of the case at bar, have never been discussed in connection with such issues as made their determination necessary to the decision of the case. These questions are:

1. What consideration ought to be given to the local statutes of this State regulating irrigation?

2. How should the fact that water for irrigation

in the arid sections of this State is a natural want and necessary to the existence of man in those localities, affect the determination of an action involving the use of flowing water for that purpose?

3. What importance should be given to the doctrine of reasonable use where a land-owner diverts only so much water as is necessary for the purpose of irrigation?

The principles involved in the case at bar are too important to be controlled by authority of former decisions, even if some of the questions here presented might have been determined in such former cases if they had been there presented.

In considering the magnitude of the interests depending upon a proper solution of the questions involved in this record, all cases where the questions here presented were not involved, or, if involved, were not directly presented and passed upon by the Court, ought to be excluded as precedents for the case at bar. This Court cannot be responsible for not considering facts outside of the record which ought to have been presented by the parties; nor for overlooking statutes scattered through the California legislative proceedings for the last thirty years, not called to the attention of the Court by the parties or by their attorneys.

Ferrea vs. *Knipe*, 28 Cal., 341, was the first case which arose in any county of this State where the watercourses are regulated by acts of the Legislature. No question of riparian rights was necessarily involved in the case. The statement of facts shows that the plaintiff who recovered in that action, was the prior appropriator of the water of a small stream for the purposes of irrigation, and that he relied upon such prior appropriation as the foundation for his right to recover. The discussion, in the opinion of the Court, was outside of the facts presented by the record. Neither Judge Sanderson nor Judge Sawyer concurred. The statement of facts in the record shows that there was no question involved in the case analagous to any question presented by the record in the case at bar. The following is the statement of the case:

Plaintiff commenced his action on the 18th day of June, 1864, alleging that for eight years then immediately preceding he had been in the possession of a parcel of land consisting of twenty-five acres, through which runs the Sulphur Spring Creek, in Solano County, which he had used during that time as a garden for raising vegetables for market; that in May, 1856, he constructed a dam upon his land across the creek, and since then had appropriated without hindrance to his own exclusive use for irrigating his garden, all the waters of the stream; and he claimed that by reason of his long continued exclusive use of the water he had acquired a right by prescription to the use thereof to the extent and for the purpose of its original appropriation, and then had the right to the flow of the entire water of the creek without obstruction, into the reser-

voir created by his dam, for the benefit of his land, as a right and privilege appurtenant thereto. He then claims that in 1863 the defendant erected a dam across the stream, above the plaintiff's dam, by which a part of the water was prevented from running down the course of the creek to plaintiff's land. That in April, 1864, the defendant constructed other dams across the same stream, and that, by reason of the obstruction and diversion of the water by these dams, the plaintiff was deprived of his accustomed use of it, to the great injury of his business and to his great damage. (28 Cal., 341.)

Issue was joined upon these facts, and the case was tried and judgment rendered for the defendant. The facts alleged in the complaint as to the construction of the several dams of plaintiff and defendant appear to have been admitted. The Court found that the dams of the defendant entirely obstructed the flow of the stream, but at times in the dry season there was not sufficient water, even if unobstructed, to reach plaintiff's dam. The Court also found that the defendant only retained sufficient water by his dams to water his stock, and held that he had a right so to do, if he consumed all the water in the creek. The Supreme Court took a different view of the law and held that if a riparian owner might use all the water of a stream for domestic purposes and for watering stock, he had no right to obstruct the flow by a dam so as to prevent the running of the water substantially as, in a state of nature, it was accustomed to run, and reversed the judgment.

The correctness of this ruling, even where the English doctrine of riparian rights prevails, might be questioned.

If, according to the weight of authority*, a riparian proprietor may take all the water of a stream for his stock and domestic purposes, why may he not build a dam sufficient to retain it for such purpose?

But the question of riparian rights was not involved, and the discussion was unnecessary to the decision. Plaintiff was not confined to his rights as a riparian proprietor.

He was the prior appropriator of all the water for a purpose equally meritorious and as necessary as that for which the defendant used it, and should have had judgment on the principle of "prior in time, prior in right." He was located on the stream below defendant's dam, and his appropriation being prior, the construction of defendant's dam was in violation of the statute. By the 14th section of the Act of May 15, 1854, as amended in April, 1862, defendant was prohibited from diverting the water to the detriment of a person located on the stream below. A total obstruction by a dam would seem to be equivalent to a diversion. That section reads as follows:

> No person or persons shall direct [divert] the waters of any river, creek, or stream, from its natural channel,

*Gould on Waters, Sec. 205.

to the detriment of any other person or persons, located below them, on any such stream, unless previous compensation be ascertained, and paid therefor, under the provisions of this Act, or under the provisions of other laws of this State authorizing the taking of private property for public uses. (Statutes 1862, p. 235. App. page 13.)

The decision of the Supreme Court was right, but the reason given was outside of the issue. The statute appears to have been overlooked. The case is certainly no authority for any question presented in the record of the case at bar.

Creighton vs. *Evans*, 53 Cal , 55, was an action for the diversion of water in Tulare County. The defendant had judgment, and plaintiff appealed to the Supreme Court. The case was reversed by the Supreme Court for error in instructions of the Court below, to wit:

The Court instructed the jury that if the defendant diverted a portion of the water for a useful purpose—such as, for example, for domestic use—and that enough was left in the stream for the use of the plaintiff for watering his stock, and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendants. (53 Cal., 56.)

This decision of the Supreme Court was in plain violation of the statutes in force in Tulare County. No possible construction could be put upon those statutes which would deny to any person the right to appropriate and use, for a beneficial purpose, any unappropriated flowing water.

Statutes of 1854, p. 180; App., p. 1.

Statutes of 1868, p. 112; App., p. 50.
Statutes of 1876, p. 547; App., p. 75.

Pope vs. *Kinman*, 54 Cal., 3, is no authority for the respondent. Defendants had diverted and appropriated the waters of Lytle Creek, in San Bernardino County, for the purpose of irrigation, and had been in the use and possession of the same to irrigate their lands for about twenty years. The plaintiff was the owner of a Mexican grant on the stream above the lands of the defendants. The water of the stream was diverted by means of a ditch across plaintiff's land. Plaintiff obtained a patent in 1872, and before the expiration of the statutory period of limitation, commenced this action. While it is undoubtedly true that the defendants could acquire no right to the land of the plaintiff without condemnation, before the expiration of the statutory period of limitation, and for that reason could not defend the action, it is equally true if defendants had taken the proper steps to obtain right of way, they had a superior right to the water in controversy by reason of prior appropriation.

The statutes in force in San Bernardino County since the year 1857, have made the right to the use of water for irrigation to depend upon prior

appropriation, and not upon title to the land over which it flows.

Statutes of 1857, p. 63; App., p. 5.
Statutes of 1859, p. 217; App., p. 8.
Statutes of 1864, p. 87; App., p. 15.
Statutes of 1865–6, p. 93; App., p. 30.

These statutes were probably not called to the attention of the Court.

Zimmler vs. *San Luis Water Co.*, 57 Cal., 221, involved the question of the construction of a deed and not the question of the right to water.

The St. Helena Water Co. vs. *Forbes*, 62 Cal., 182, was an action to condemn the water of Hudson or York Creek to supply the town of St. Helena. It was conceded that the defendant owned the stream of water, and the only question was whether that kind of property was subject to condemnation.

Wilcox vs. *Hausch*, 64 Cal., 461, is a short opinion by the Court, and simply holds that a person turning water into a stream thereby acquires no right to take out more water than he lets in, and the burden of proof is on him to show that he has not done so.

If there is anything in any of these authorities calculated to embarrass the Court in considering the questions now presented on the merits, we are unable to perceive it.

Flowing Water in this State Belongs to the People.

It has been the established law upon the public lands since the discovery of gold in California, that the right to the use of flowing water for mining and agricultural purposes is acquired by appropriation.

Irwin vs. *Phillips*, 5 Cal., 140.
Bear River Mining Co. vs. *New York M. Co.*, 8 Cal., 327.
Hill vs. *King*, 8 Cal., 338.
Conger vs. *Weaver*, 6 Cal., 548.
Merced Mining Co. vs. *Fremont*, 7 Cal., 317.

This right is not only valid as against subsequent appropriators, but it is also valid as against and superior to the rights of the United States. By the customs, usages, and necessities of the Pacific States, the person who first appropriated flowing water for mining or agricultural purposes acquired a right and title which was held valid by the United States as against the title of a United States patent. This was expressly decided in *Broder* vs. *The Water Co.*, 101 U. S., 276, in which the Court said:

> It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural

irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the Act of 1866. We are of the opinion that the section of the Act which we have quoted, was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one. (101 U. S., 276.)

See also *Osgood* vs. *Water & M'g Co.*, 56 Cal., 571.

Flowing water has been treated by the legislation of this State for more than thirty years as *publici juris*, and subject to be appropriated under State laws. Every act on the subject assumes the right of the State to control the use of flowing water. In some of these acts, the assertion that water belongs to the public and is subject to legislative control, is implied from the assumption of power to legislate upon the subject, and in others the declaration of the right of the people to all flowing water is made in express terms. For example, in the Act of March 10, 1874, for Los Angeles County, we find the following: "All " waters from rains, rivers or streams which can " be applied to irrigation purposes, are hereby de- " clared the property of the people, to be held for " their use, and so utilized as to confer the great- " est possible good upon the greatest number."

Statutes of 1873-4, page 318; App., p. 63.

The United States Followed the Laws of this State.

Congress, in 1866, and again in 1877, adopted what was supposed to be the law of California on the subject of water rights, as appears from the following quotations:

[July 26, 1866. Section 2339, R. S.]

Whenever by priority of possessions, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage, shall be liable to the party injured for such injury or damage.

[March 3, 1877. Vol. 19, Statutes U. S., p. 377.]

The right to the use of water for the reclamation of desert lands in accordance with the provisions of an Act approved March 3, 1877, shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of lakes, and rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights.

Notwithstanding these acts of Congress, the decision of the Supreme Court of Nevada, in

Vansickle vs. *Haines*, holding that a subsequent purchaser of land from the United States might deprive a prior appropriator of water to irrigate his land, so alarmed the Legislature of California as to induce it to pass the memorial of March 6th, 1878, above set forth. This memorial was answered by the Supreme Court of the United States before Congress had an opportunity to act. At the October term, 1879, in *Broder* vs. *The Water Co.*, *supra*, the Supreme Court, as we have already seen, recognized and held appropriations of water upon the public lands valid as against subsequent purchasers from the United States, whether made before or after the passage of the Act of 1866.

In 1880, the Supreme Court of this State, in *Osgood* vs. *Water & Mining Co.*, 56 Cal., 571, concurred in the doctrine of the Supreme Court of the United States in *Broder* vs. *The Water Company*, and thereby repudiated the doctrine of *Vansickle* vs. *Haines*. This being the law, it answered fully the memorial and placed the State and Federal governments in harmony in maintaining the right of appropriation.

Supreme Court of Nevada Overrules Vansickle vs. Haines.

Since the above was in type, we have received the decision of the Supreme Court of Nevada in *Jones* vs. *Adams*, rendered on the 1st day of April,

1885. In that case the Court reviews at length the decisions of the Supreme Court of the United States, and of the State of Nevada, relating to the use of water for irrigation. It approves of the doctrine of appropriation, and holds that priority of appropriation is the test of superiority of right, as declared by the Supreme Court of the United States in *Broder* vs. *Water Company*, and by the Supreme Court of Colorado in *Coffin* vs. *Ditch Company, supra.* It concurs in the views of the minority of this Court in the case at bar, by citing as authority the dissenting opinion of Mr. Justice Ross. It utterly repudiates the doctrine of riparian rights as claimed by the respondents, and holds that by the common law, irrigation is a reasonable use of water; and in arid countries, such use is a natural want to which artificial wants must be subservient. It reverses the practice of deciding American cases upon English facts, thus ignoring the facts of cases under consideration. It holds that each case must be decided by its own environments. It is to be hoped that the example set in *Vansickle* vs. *Haines*, of importing facts from England upon which to decide American cases, will now be discarded as a precedent. (*Jones* vs. *Adams*, 6 West Coast Rep., p. ~~124~~ 140.)

Appropriators of Water and Purchasers of Swamp Lands are Equally Protected by Law.

Plaintiffs have no more right to the water appropriated by the defendant, than the defendant has to the land reclaimed by the plaintiffs. All the rights of both parties were acquired either from the State or the United States. The laws of both governments were and are the same so far as they affect the questions involved in this action. Both the State and the United States, where water is essential to mining or agriculture, have disposed of the water and the land separately. They have offered the lands of the State and of the United States for sale, or rather to occupation of settlers—the title to be acquired by complying with certain conditions. The most important of these conditions has always been habitation and cultivation. Both governments have, since the first settlement of this State, offered free of charge, all flowing water in the mining regions and in the arid districts to any person who would appropriate it under regulations provided by law, and apply it to the wants of mining or agriculture.

We have already examined the system of laws passed by California for the arid sections of this State, including Kern Valley. Plaintiffs were ad-

vised when they acquired title to the swamp lands described in the findings, that others had acquired and were acquiring water rights on Kern River. It is an historical fact that a large portion of the waters of Kern River had been appropriated before plaintiffs bought their land, and it was well known that these appropriations were being continually made. The Legislature was continuing to pass laws regulating these appropriations, and at all times, all water not appropriated was offered to the first person who would appropriate it for the purpose of irrigation. Under such facts, it is absurd to say that the man who took land on the terms offered by the State has any better right to his land than the man who took water on the terms offered by the State for the distribution of water, has to the water so taken or appropriated by him. The Legislature certainly recognized the rights of those who appropriated water on Kern River as equally sacred as any other rights of property. The Act of 1876, which provided that all the water not appropriated in the counties named was subject to appropriation, recognized the rights of all appropriators before that time, and at the same time continued the policy of the State of disposing of the land and water separately. By this act the State asserted its right to dispose of the water of Kern River—a right which had never at that time been denied,

although exercised from a period long anterior to the purchase of any lands by plaintiffs. There can be no hardship or claim of interference with vested rights. All the parties knew the law, and also knew that the law was reasonable and in accordance with the principles of justice and the laws of nature, as we have already shown.

Conclusion.

In conclusion, we say:

1. That by the principles of the common law, plaintiffs have no right to require the water in controversy to flow over their lands, while the same is needed for irrigation by those who have appropriated it for that purpose, and, that independent of the legislation of this State, plaintiffs cannot recover.

2. That this State and the United States disposed of the land and water in Kern Valley separately. By the purchase of land, no right was acquired to the use of water, nor was any right to land acquired by the appropriation of water. Distinct, separate, and well-defined acts were required to be performed, either to obtain the title to the land, or the right to the use of flowing water.

3. This Court is the only tribunal under our form of government which can intelligently de-

termine what rules are applicable in regulating the use of water in the diversified conditions existing in California. The Legislature, from the very nature of things, is incompetent to hear and determine what laws are necessary and proper governing such use in a country possessing the variety of physical conditions found in this State. But, if it should be conceded that the Legislature could, by declaratory law, aid in the solution of the questions involved in this action, it is sufficient to say that it is not the province of the Legislature to affect past transactions.

This case must be decided on the law as it exists. If the statutory law be insufficient or incomplete, the Court must adopt the usages and customs of the people and decide the case at bar in the light of its own environments, and not according to the authority of cases decided under other and different circumstances. California has as much right to make her own laws as any other commonwealth. Her people have from the beginning manifested a capacity to mould and shape their conduct and conform their occupations to new conditions and circumstances with an enlightened reason and a sensitive regard for justice and the public good, which has challenged the attention and elicited the admiration of all learned jurists who have had occasion to study

the growth of the common law in the Pacific States and Territories.*

The evidences of what Judge Cooley terms "Popular Legislation," are spread upon the surface of every arid valley in the State. The ditches, canals, reservoirs, and other hydraulic works and appliances for the distribution of water throughout these valleys tell us what the people have done and are now doing.

These vast improvements have required much money and many years of toil. The Court is informed by what people have done, what must be done in the future, if justice is administered according to enlightened reason. This tribunal cannot wait for legislation—it must act now. The duties imposed by the new facts here presented are not different in character from the ordinary duties of Courts. The business of the country cannot wait for legislation. There is no more reason for saying to the agriculturalists of this State that the Legislature must act before your rights can be protected, than there is for saying to the people who are affected by railroads, telegraphs, or other modern inventions, that their rights cannot be protected by the Courts without a special act of the Legislature for each individual

---

* *Sparrow* vs. *Strong*, 3 Wall., 97; *Atchison* vs. *Peterson*, 20 Wall., 507; *Basey* vs. *Gallagher*, id., 670; *Forbes* vs. *Gracey*, 94 U. S., 762; *Jennison* vs. *Kirk*, 98 id. 453; *Broder* vs. *Water Co.*, 101 U. S., 274; Wharton's Commentaries on American Law, Sec. 25.

case. The rule that priority of appropriation is the test of priority of right in the use of water in the arid sections of this State, is and has been the law since the formation of the State government. There is no necessity for more legislative acts. It only remains for this Court to declare the law as the people have made it.

4. The rule given in the *Sermon on the Mount* to distinguish between true and false prophets, is the true test by which to determine what the common law is when applied to new conditions. This test is always applied by learned jurists to determine what is good law. It is as follows:

"Beware of false prophets, which come to you "in sheep's clothing, but inwardly they are rav- "ening wolves.

"Ye shall know them by their fruits. Do men "gather grapes of thorns, or figs of thistles?

"Even so every good tree bringeth forth good "fruit; but a corrupt tree bringeth forth evil "fruit.

"A good tree cannot bring forth evil fruit, "neither *can* a corrupt tree bring forth good "fruit.

"Every tree that bringeth not forth good fruit "is hewn down, and cast into the fire.

"Wherefore by their fruits ye shall know "them."

(VII Chap. Matthew, 15th to 21st verse.)

By the foregoing authority, the law of appropriation which made the orange groves of Riverside and the vineyards of Fresno possible is a good law, and "bringeth forth good fruit." A law which would relegate those goodly fields to desert wastes is not the common law, because it is bad law, and "bringeth forth evil fruit."

This Court takes judicial notice of the laws of nature,* which inform it that the climate of England cannot be imported into California. We inherit from our English ancestors the common law. Our right of inheritance does not extend to their fogs, their mists, nor their moors. Our deserts are our own, yet we may apply the common law in regulating the use of water upon them so as to "bring forth good fruit" in abundance. The common law is as applicable to a desert as to a swamp. We earnestly hope that this Court will follow the example of the Supreme Court of the United States in *Sparrow* vs. *Strong*, 3 Wall., 97. Congressional legislation prohibited all persons from entering upon the mineral lands of the United States, yet that Court took cognizance of the laws made by the miners themselves and protected their possessory rights notwithstanding the prohibition of the statute.

---

* Code of Civil Pro., Sec. 1875.

The Supreme Court knew these mining laws by their fruits. It refused to "shut its eyes" to "public history" which informed it that under the implied sanction of the Government, "vast mining interests had grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." Why should not this Court examine the fruits of irrigation and also refuse to shut its eyes to public history, which informs it that under the legislative sanction of the State and of the United States, and in pursuance of established custom, many millions of capital have been expended in converting desert wastes into fruitful fields, contributing largely to the prosperity and improvement of California?

Respectfully submitted,

STEWART & HERRIN,

Attorneys for the Merced Canal and Irrigation Co., and others.

SYNOPSES OF ACTS

Passed by the Legislature of California, relating to watercourses and their use for irrigation by the people and by corporations.

[May 15, 1854. Statutes 1854, p. 180.]

This Act creates a Board of Water Commissioners and the office of Overseer in each township of the several counties of this State, to regulate watercourses within their respective limits.

Section 1. Specifies the Counties of San Diego, San Bernardino, Santa Barbara, Napa, Los Angeles, Solano, Contra Costa, Colusa and Tulare.

Section 3. The duties of the Commissioners shall be to examine and direct such watercourses and apportion the water thereof among the inhabitants of their district, determine the time for using the same, and upon petition of a majority of the persons liable to work upon ditches, lay out and construct ditches, as set forth in such petitions. No authority is given in this Act for diversion or appropriation of water for irrigation by individuals or corporations independent of the action of the Boards of Water Commissioners, and it has no reference to the use of water for mining purposes. See Section 15.

[February 19, 1857. Statutes 1857, p. 29.]

This Act amends the law of 1854 as to the counties in which it shall operate, adding San Luis Obispo and Santa Cruz Counties and excluding San Bernardino.

[April 28, 1860. Statutes 1860, p. 335.]

This Act amends Section 15 of the Act of May 15, 1854.

[February 21, 1861. Statutes 1861, p. 31.]

This Act also adds Tehama and Sonoma Counties.

[April 10, 1862. Statutes 1862, p. 235.]

This Act amends Sections 2, 3, and 14 of the Act of May 15, 1854.

SAN BERNARDINO COUNTY.

[May 15, 1854. First Act.]

[March 6, 1857. Statutes 1857, p. 63.]

By the law of March 6, 1857, San Bernardino County was excepted from the operation of the law of May 15, 1854. This law, however, differs but little from the former law, either in form or principle.

[April 12, 1859. Statutes 1859, p. 217.]

The law of April 12, 1859, amended Section 11 of the previous Act so as to prevent an unequal distribution of water and prevent fraud therein.

[February 18, 1864. Statutes 1863-4, p. 87.]

This law of February 18, 1864, repealed the previous laws and became a substitute therefor, providing for greater efficiency in the management of the ditches and distribution of water.

[February 14, 1866. Statutes 1865-6, p. 93.]

The law of February 14, 1866, amended sections two, four and sixteen of the previous Act, in order that redistribution of water could be made in certain cases, and the time determined for using the water by the irrigators; also, for keeping the ditches in better condition, and preventing the improper use of water by persons when not authorized to use the water.

No other county in the State has so complete and satisfactory a law on the subject of irrigation as San Bernardino County, and with some modifications to extend water privileges to new settlers and enforce the economical use of water by the present users, such a law could be made applicable to the wants of irrigators in any county of the State.

LOS ANGELES COUNTY.

[May 15, 1854.]

[April 1, 1864. Statutes 1863-4, p. 289.]

Water franchise to P. Banning for supplying Camp

Drum and Town of Wilmington with water for domestic uses and irrigation.

[March 10, 1874. Statutes 1873-4, pp. 312 to 318]

An Act to promote irrigation in Los Angeles County. Section fourteen repeals all Acts inconsistent with the provisions of this Act, so far as relates to the County of Los Angeles, except as to Los Angeles River and the City of Los Angeles, which are excepted by section thirteen.

[March 20, 1878. Statutes 1878, p. 374.]

An Act to provide for and regulate irrigation in Township of Los Nietos, in the County of Los Angeles. The scope of this Act is not very different in principle from the laws of 1854 and 1874, just referred to, but is more particular in pointing out the duties of officers, and what irrigators have to do in acquiring water rights and using the water for irrigation. While this law repeals all former laws as to the Township of Los Nietos, Section 23 extends the privilege of this Act to any other township in the county desiring to avail themselves of its provisions, and points out the mode of proceeding.

CITY OF LOS ANGELES.

[April 2, 1870. Statutes 1869-70, p. 645.]

Concerning watercourses in the City of Los Angeles.

[April 2, 1870, p. 702.]

Act creating a Board of Water Commissioners in the City of Los Angeles, defining their powers and duties.

[January 19, 1872. Statutes 1871-2, p. 30.]

Repealing last Act, and conferring the powers and duties of Board of Water Commissioners on Mayor and Common Council.

[February 20, 1872. Statutes 1871-2, p. 128.]

Sections 2, 3 and 4 of Act amending the charter of the City of Los Angeles, confers upon the Mayor and

Common Council control over zanjas, watercourses, ditches, and canals within the city limits.

[March 26, 1874. Statutes 1873–4, p. 633.]

Section 1 of Article 2 of Act amending the charter of the City of Los Angeles, relates to watercourses and the control thereof within the city limits.

[April 1, 1876. Statutes 1875–6, p. 692.]

City charter again amended, and Section 1 of Article 2, defines the rights and powers of the City over Los Angeles River, and the distribution of water within the city limits.

TULARE COUNTY.

[March 15, 1864.]

[Statutes 1863–4, p. 167.]

This Act creates a Special Board of Commissioners for constructing a canal for irrigation and drainage purposes from the Kaweah River to a point near the town of Visalia.

[April 4, 1864. Statutes 1863–4, p. 375.]

Creates a Board of Water Commissioners for Tulare County; defines their powers and duties, and by Section 12 repeals all Acts of a general character conflicting with the provisions of this Act, so far as Tulare County is concerned.

[March 20, 1866. Statutes 1865–6, p. 313.]

This Act is amendatory of the preceding Act, amending Sections 2, 3, 4, 5, 6, and 7. It recognizes the existence of ditches, and the ownership thereof, aside from the public ditches provided for by the Acts of 1854 and 1864, by subjecting them to the control of the Board for the equitable distribution of the water.

[March 7, 1868. Statutes 1867–8, p. 112.]

This Act permits and provides for the private and company ownership of ditches for irrigation, subject to

supervision by the Board of Water Commissioners to prevent waste, and from whom permission to construct the ditch must first be obtained, and by whom the quantity of water to be used therein must be determined. This Act repeals the Acts of April 4, 1864, and March 20, 1866.

[April 1, 1872. Statutes 1871-2, p. 945.]

This Act, though entitled "An Act to Promote Irrigation," applies equally to drainage. Its operation is prohibited in Fresno, Kern, Tulare and Yolo counties. It does not repeal any prior laws passed for special counties.

[March 20, 1876. Statutes 1875-6, p, 547.]

"An Act concerning water ditches and water privileges for irrigation, mining and manufacturing purposes in Fresno, Tulare and Kern." It repeals all Acts and parts of Acts in conflict with it. Like the Act of March 7, 1868, it permits the construction of private and company ditches, but gives the Board of Supervisors, instead of a Board of Water Commissioners, the authority to grant permission and declare the quantity of water which may be used.

FRESNO.

[April 2, 1866. Statutes 1865-6, p, 777.]

This Act creates a Board of Water Commissioners for Fresno County, authorizing them to establish irrigation districts, appoint Overseers, lay out ditches, and determine the quantity of water to be used, see that it is properly used to prevent waste, and that the ditches are kept in good repair. This Act repeals all Acts of a general character, so far as they affect Fresno County.

[March 29, 1876. Statutes 1875-6, p. 547.]

See reference to this Act under head of Tulare County.

[March 25, 1878. Statutes 1877-8, p. 468.]

This Act created an irrigation district known as the "West Side Irrigation District," and relating to the

counties of San Joaquin, Stanislaus, Merced and Fresno. By Section 41 of this Act, the State not only gave the right of way over State land for the contemplated canal, and provided for the condemnation of other lands required, but "dedicated and set apart for the uses and purposes of the canal, all waters and water rights belonging to the State within the district necessary for said purposes."

KERN COUNTY.

[April 2, 1866. Statutes 1865-6, p. 796. Statutes 1875-6, p. 547.]

This county was erected out of the territory of Tulare and Los Angeles counties, and for the portions thereof as taken from the respective counties, the laws on the subject of irrigation remained unchanged until March 29, 1876, when the county came under the same provisions as Tulare and Fresno, above referred to, in the matter of irrigation.

[April 1, 1872. Statutes 1871-2, p. 945.]

From the operation of the Act of April 1, 1872, Kern County was specially excepted, as well as Fresno, Tulare and Yolo counties.

[March 29, 1876. Statutes 1875-6, p. 499.]

Special Act passed for improving a portion of King's River, and the construction of booms in the river for logging purposes.

COLUSA COUNTY.

[May 15, 1854. First Act.]

[March 26, 1866. Statutes 1865-6, p. 451.]

Special Act for construction of canal in Colusa, Yolo and Solano counties.

TEHAMA COUNTY.

[February 21, 1861. Statutes 1861, p. 31.]

By this Act Tehama County was brought under op-

eration of the law of May 15, 1854, in relation to the use of water for irrigation, and the means for conducting the same.

[March 30, 1872. Statutes 1871–2, p. 732.]

This Act applies specially and only to Tehama County, and is supplemental to the Act of April 2, 1870 (Statutes 1869–70, p. 660) providing for the "incorporation of canal companies, and to provide for the construction of canals and ditches."

SONOMA COUNTY.

[February 21, 1861. Statutes 1861, p. 31.]

By this Act Sonoma County was brought under the operation of the law of May 15, 1854, in relation to the use of water for irrigation and the construction of canals for conducting the same, and no law has since been passed modifying its application to Sonoma County.

SAN DIEGO, SANTA BARBARA, NAPA, SOLANO, CONTA COSTA, SANTA CRUZ, AND SAN LUIS OBISPO COUNTIES.

May 15, 1854. Statutes 1854, p. 76.]

This Act applies to these counties, and without subsequent change.

YOLO COUNTY.

[March 26, 1866 Statutes 1865–6, p. 451.]

Act to develop the agricultural interests of, and to aid in the construction of a canal for irrigation and inland trade in the Counties of Yolo, Colusa, and Solano.

[April 1, 1872. Statutes 1871–2, p. 945.]

Act to promote irrigation. Yolo, Fresno, Kern, and Tulare, excepted from its operation.

YUBA COUNTY.

[April 2, 1866 Statutes 1865-6, p 812]

Act authorizing certain parties named therein to construct a watercourse for irrigation and motive power from the Yuba River to Marysville.

MERCED COUNTY.

[April 13, 1860. Statutes 1860, p. 182.]

Act creating a Board of Water Commissioners and defining their powers and duties.

SISKIYOU COUNTY.

[March 31, 1866. Statutes 1865-6, p. 609,]

Act creating a Board of Water Commissioners and defining their powers and duties. This Act is of the same general character as the laws of other counties amending the first law of 1854.

SAN FRANCISCO.

[Two Acts of May 3, 1852. Statutes 1852, pp. 171 and 200.]

First Act provides for the incorporation of water companies. Second ratifies the ordinance of June 11, 1851, for introducing water into the City of San Francisco.

[Two Acts of March 18, 1858. Statutes 1858, pp. 73 and 75.]

First Act ratifies ordinance of March 19, 1856, authorizing the Mountain Lake Water Company to introduce fresh water into the city, but prohibiting any construction of said Act from impairing any rights of the San Francisco City Water Works.

Second Act ratifies ordinance of August 6, 1857, authorizing the San Francisco City Water Works to

introduce pure fresh water into the City and County of San Francisco for fire, municipal, and other purposes.

[April 22, 1858. Statutes 1858, p. 218.]

General Act for the incorporation of water companies to supply any city and county or any cities or towns in this State, or the inhabitants thereof, with pure fresh water.

[April 23, 1858. Statutes 1858, p. 254.]

Act authorizing the owners of the Spring Valley Waterworks to lay down water pipes and furnish water for fires and other municipal uses.

[April 11, 1859. Statutes 1859, p. 209.]

Act amendatory of the preceding Act, guarding against interference with other water or gas pipes, or with the right of the Mountain Lake Water Company, or the San Francisco Water Works Company.

[April 24, 1861. Statutes 1861, p. 228.]

This Act amends Section 2 of the Act of April 22, 1858, and directs the mode of procedure in acquiring lands, water, reservoirs, etc., for supplying pure fresh water to the inhabitants of any city or town in the State.

[May 18, 1861. Statutes 1861, p. 533.]

Act for the protection of water companies and to prevent the destruction of water works and the fraudulent use of water.

[April 8, 1863. Statutes 1863, p. 225.]

Act extending the rights and privileges of the San Francisco City Water Works Company and releasing said company from the payment to the city of five per cent. of its gross earnings.

[April 27, 1863. Statutes 1863, p. 745.]

Act provides for the consolidation of three companies organized to supply San Francisco with pure fresh water, viz: Glas and Salinas Water Company, Crystal Springs Water Company, and the Spring Valley Waterworks.

[March 30, 1874. Statutes 1873–4, p. 807.]

Act authorizing the City and County of San Francisco to provide and maintain public waterworks for said city and county, and to condemn and purchase private property for that purpose.

[March 1, 1876. Statutes 1875–6, p. 82.]

Act to establish water rates in the City and County of San Francisco.

[March 27, 1876. Statutes 1875–6, p. 501.]

Act to authorize the City and County of San Francisco to provide and maintain public waterworks for said city and county, and to condemn and purchase private property for said purpose.

[April 3, 1876. Statutes 1875–6, p. 760.]

Act amendatory of and supplementary to Act of March 1, 1876.

[January 22, 1880. Statutes 1880, p. 1.]

Act repealing Act of March 27, 1876, which provided for acquiring and maintaining public waterworks in the City and County of San Francisco.

ARTESIAN WELLS.

[March 18, 1876. Statutes 1875–6, p. 331.]

This Act regulates artesian wells, to prevent waste and damage by overflow thereof in Santa Clara and Los Angeles Counties.

[March 9, 1878. Statutes 1877–8, p. 195.]

This Act regulates, generally, the use of artesian wells, and to prevent the waste of subterranean waters in this State.

DISTRCT SYSTEM.

Acts passed authorizing the organization of districts for irrigation:

[April 1, 1872. Statutes 1871-2, p. 945.]

This is the first law bearing upon district organization for irrigation. Its application in Fresno, Kern, Tulare, and Yolo was prohibited by Section 26 of the Act.

[March 10, 1874. Statutes 1873-4, p. 312.]

This Act establishes the district system of irrigation for Los Angeles County, and repeals the Act of May 15, 1854, as to said county.

[March 20, 1878. Statutes 1878, p. 374.]

This Act creates a special district and law for Los Nietos, in Los Angeles County, but also by Section 23, permits the creation of other districts in the same county, to be governed by the same law.

[March 29, 1878. Statutes 1878, p. 634.]

Act creating the office of State Engineer, defining his duties, and providing a system of irrigation and promoting rapid drainage and improving the navigation of the Sacramento and San Joaquin Rivers.

THE ORGANIZATION OF CORPORATIONS FOR IRRIGATION PURPOSES.

[April 22, 1850. Statutes 1850, p. 347.]

This Act authorizes the creation of corporations for the specific purposes named in the Act, but does not embrace irrigation.

[May 14, 1862. Statutes 1862, p. 540.]

This is the first Act which, in express terms, allows corporations to be organized for engaging in irrigation as a business. It increases the topics referred to in Chapter 5 of the Act of April 22, 1850, p. 347; May 3, 1852, p. 171; of April 14, 1853, p. 87; of May 18, 1853, p. 251; of April 30, 1855, p. 205; of April 22, 1858, p. 218, and includes irrigation.

Section 5 of this Act has been amended at various times, as to the counties to which it may or may not

apply, viz: Statutes 1865–6, pp. 53 and 605; 1867–8, p. 134; 1871–1, p. 732.

[April 2, 1870. Statutes 1869–70, p. 660.]

This Act repeals the Act of April 14, 1853, and is a substitute therefor, applying to the same special topics, but making modifications therein and omitting the exceptions as to the particular counties named in the Act of April 14, 1853.

[April 4, 1870. Statutes 1869–70, p. 822.]

This Act relates to corporations formed for trading, manufacturing, mechanical, or other lawful business or purpose, subjecting them to the duties, conditions and liabilities imposed therein, and by certain sections of the Act of April 14, 1853, and of all other Acts amending the sections named.

WATER RIGHTS BY APPROPRIATION UNDER THE CIVIL CODE.

Sections from 1410 to 1422, inclusive, took effect January 1, 1873, provide specific rules for the appropriation of water, and have not been amended.

But while their application would seem to be general to all parts of the State, we find that Section 19, Subdivision 6, of the Political Code, makes this exception, viz: "All Acts creating or regulating Boards of Water Commissioners and Overseers in the several townships or counties of the State," remain unaffected by either of the Codes.

[March 27, 1872. Statutes 1871–2, p. 622.]

Act to put into effect the provisions of the Civil Code relative to water rights.

GENERAL LAW FOR ESTABLISHING WATER RATES FOR IRRIGATION.

[March 26, 1880. Statutes 1880, p. 16.]

Act authorizing Boards of Supervisors of the counties in which water is sold for irrigation to fix the rates at which water shall be sold.

WATER AND WATER RIGHTS AS DECLARED BY THE CONSTITUTION.

ARTICLE XIV.

SECTION 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; *provided,* that the rates or compensation to be collected by any person, company, or corporation in this State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the Board of Supervisors, or city and county, or City or Town Council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any Board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city or town, where the same are collected for the public use.

SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

WATER RIGHTS UNDER UNITED STATES LAWS.

[July 26, 1866, Section 2339, R. S.]

Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of Courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

DESERT LAND ACT—WATER FOR RECLAMATION.

[March 3, 1877. Vol. 19, Statutes U. S., p. 377.]

The right to the use of water for the reclamation of desert lands, in accordance with the provisions of an Act approved March 3, 1877, shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.

Service of copy within
admitted this Apr. 16. 1888.

Stetson & Houghton
Atty for Appts.